MAR 31 1993

NO. 1656

IN THE

Supreme Court of the United States

October 1993 Term

RALPH E. FACEMIRE

Petitioner.

v.

LIBERTY SAVINGS BANK (RTC)

Respondent.

v.

BEN J. POWERS CONSTRUCTION, INC.
BEN J. POWERS and HAZEL POWERS

Respondents.

SUPPLEMENTAL APPENDIX

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

LIBERTY SAVINGS BANK

Complainant,

v.

BEN J. POWERS CONSTRUCTION, INC.
A Virginia Corporation,

-and-

BEN J. POWERS AND HAZEL POWERS

Defendants and Third-Party Complainants

v.

RALPH E. FACEMIRE

Third-Party Defendant.

In Chancery No. 90-33

FINAL DECREE

THIS CAUSE came on to be heard the 21st day of September, 1992, before the Honorable J. Michael Gamble, sitting by designation, upon a Motion for Sanctions filed on behalf of Third-Party Complainants, Ben J. Powers Construction, Inc., Ben J. Powers and Hazel Powers (collectively "Powers") against Third-party Defendant Ralph E. Facemire ("Facemire"); upon the testimony and evidence presented by Powers in support

of their motion and upon argument by Facemire in opposition thereto; and,

IT APPEARING TO THE COURT that Mr. Facemire's actions subsequent to the specific performance case were in many respects undertaken in bad faith with the intent to harass and obstruct; and,

UPON CONSIDERATION THEREOF; it is accordingly, ADJUDGED, ORDERED AND DECREED that judgment is hereby granted to Ben J. Powers Construction, Inc., Ben J. Powers and Hazel Powers in the amount of $6,500.00 against Ralph E. Facemire as sanctions for his improper conduct and actions in this litigation pursuant to Section 18.1-271.1 of the 1950 Code of Virginia as more fully set forth and for the reasons stated in this Court's Memorandum Opinion dated December 2, 1992, which is attached hereto and specifically incorporated herein.

The endorsement of Counsel and Parties is dispensed within accordance with Rule 1:13 of the Rules of the Supreme Court of Virginia. A copy of this Decree was mailed to Mr. Facemire and all Counsel of Record this 14th day of December, 1992.

ENTERED this 14th day of December, 1992.

HONORABLE J. MICHAEL GAMBLE
Fauquier County Circuit Court
(Sitting by Designation)

POWERS.1/PIP

VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

LIBERTY SAVINGS BANK Complainant, v. BEN J. POWERS CONSTRUCTION, INC. A Virginia Corporation, -and- BEN J. POWERS AND HAZEL POWERS Defendants and Third-Party Complainants v. RALPH E. FACEMIRE Third-Party Defendant.	In Chancery No. 90-33

ORDER

THIS CAUSE came on the 9th day of April, 1992, on the request of the Plaintiff, Liberty Savings Bank, that its claims against the Third-Party Defendant, Ralph E. Facemire, for fraud and tortious interference with contract be set for trial.

IT APPEARANCE TO THE COURT that those remaining claims for damages, having been severed from the specific

performance claims already tried, should be transferred to the law side of the Court and set for trial; it is now therefore ADJUDGED, ORDERED and DECREED that Plaintiff's claims for damages against the Third-Party Defendant, Ralph E. Facemire, are transferred to the law side of the Court and set for trial with jury on the 21st day of September, 1992, commencing at 9:30 a.m.

The parties are further directed to exchange lists of the witnesses they intend to call at trial no later than August 31, 1992, and to conclude all discovery in this matter no later than September 7, 1992.

Further, it is ADJUDGED, ORDERED and DECREED that a copy of the Complainant's Counterclaim Against the Third-Party Defendant which is attached hereto and made a part hereof as Exhibit "A" be filed by the Clerk of this Court in a separate law file; that within twenty-one (21) days after entry of this Order, the Third-Party Defendant is ORDERED to file his written response to the Complainant's Counterclaim Against the Third-Party Defendant. The Third-Party Defendant is also ORDERED

to forward a copy of his response to all counsel of record and to the Honorable J. Michael Gamble, Judge.

The endorsement of Counsel and parties is dispensed with in accordance with Rule 1:13 of the Rules of the Supreme Court of Virginia.

A copy of this Order was mailed to Mr. Facemire an all Counsel of Record this 27th day of April, 1992.

ENTER this 27th day of April, 1992.

_____

JUDGE

VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

LIBERTY SAVINGS BANK Complainant, v. BEN J. POWERS CONSTRUCTION, INC. A Virginia Corporation, -and- BEN J. POWERS AND HAZEL POWERS Defendants and Third-Party Complainants v. RALPH E. FACEMIRE Third-Party Defendant.	In Chancery No. 90-33

FINAL DECREE OF ACCOUNTING

THIS CAUSE came on to be heard the 9th day of April, 1992, before the Honorable J. Michael Gamble, sitting by designation, upon the pleading filed previously herein; Defendant Ralph E. Facemire ("Facemire") addressed the Court and presented his motion for summary judgment and argument in support thereof; Third-Party Complainant, Ben J. Powers

Construction, Inc., Ben J. Powers and Hazel Powers (collectively "Powers") addressed the Court and presented their motion for summary judgment and argument in support thereof. Thereafter, response and rebuttal arguments were presented; and,

IT APPEARING TO THE COURT that the plain meaning of the words used in the documentary exhibits A & B demonstrated an intent by Mr. Facemire to relinquish his entire interest in the heavy equipment and relinquish his entire interest in the corporation as of November 20, 1989; and,

UPON CONSIDERATION THEREOF; it is accordingly

ADJUDGED AND DECREED that the Third-Party Complainants' Motion for Summary Judgment be, and it hereby is, granted and Third-Party Defendant's Motion for Summary Judgment is hereby denied; and, it is further

DECREED that this suit is dismissed as to the Defendants/Third-Party Complainants, Ben J. Powers Construction, Inc., Ben J. Powers and Hazel Powers subject only to their right to present their motion for sanctions on September 21, 1992, and it is further

DECREED that Third-Party Complainants' Motion for Sanction against Third-Party Defendant is hereby continued to September 21, 1992 at 9:30 a.m., in the Circuit Court of Fauquier County.

The Court notes the objection of Counsel for Third-Party Complainants for its ruling continuing argument on the Motion for Sanctions to September 21, 1992.

The Court notes the objection of Mr. Facemire for its ruling granting Third-Party Complainants' Motion for Summary Judgment and denying his motion.

AND THIS DECREE IS FINAL FOR APPEAL PURPOSES AS TO ALL MATTERS DECIDED HEREIN.

The endorsement of Counsel and parties is dispensed within accordance with Rule 1:13 of the Rules of the Supreme Court of Virginia.

A copy of this Decree was mailed to Mr. Facemire and all Counsel of Record this 14th day of April, 1992.

HONORABLE J. MICHAEL GAMBLE
Fauquier County Circuit Court
(Sitting by Designation)
Enter: April 14, 1992

VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

LIBERTY SAVINGS BANK Complainant, v. BEN J. POWERS CONSTRUCTION, INC. A Virginia Corporation. -and- BEN J. POWERS AND HAZEL POWERS Defendants and Third-Party Complainants v. RALPH E. FACEMIRE Third-Party Defendant.	In Chancery No. 90-33

FINAL DECREE

THIS CAUSE came on to be heard the 23rd day of October, 1991, before the Honorable J. Michael Gamble, sitting by designation, upon the pleading previously filed herein, and upon a stipulation entered into between Complainant Liberty Savings Bank ("LSB") and Third-Party Complainants Ben J. Powers Construction, Inc., and Ben J. Powers and Hazel Powers

(Collectively "Powers"); Defendant Ralph E. Facemire ("Facemire") addressed his opening statement to the Court; Complainant Liberty Savings Bank and Third-Party Complainant Powers then waived opening statements; Third-Party Complainants then presented their evidence and rested; Defendant Facemire then presented his evidence and rested; the Court then heard closing arguments from Third-Party Complainants, Complainant LSB and Defendant Facemire; and, there being no further motions by any other party.

UPON CONSIDERATION THEREOF; it is accordingly

ADJUDGED AND DECREED that the Third-Party Complainants be, and they hereby are, awarded specific performance against Defendant Ralph E. Facemire, said award of specific performance shall vest all rights, title, ownership and possessory rights in the following equipment to, and in the name of, Ben J. Powers Construction, Inc., free from any and all claims of Third-Party Defendant Ralph E. Facemire:

EQUIPMENT	SERIAL NUMBER
1988 410 Backhoe - John Deere	T041CA743277
1985 415 Backhoe - John Deere	B004490CD
1986 963 Loader - Caterpillar	48Z00143
1984 963 Loader - Caterpillar	6Z01231
1974 955 Loader - Caterpillar	85J8285
1972 955 Loader - Caterpillar	85J5274
1987 Ford Service Truck	1FDKF3712HNA17996
1988 Demo Tailers	1F9D32204J0011422
1978 Mack Truck	R686ST18801
450E Dozer-John Deere	T0450EH731856
1988 Bobcat Prime Mover	L300210630
1988 LTL 9000 Dump Truck	1FDYA901L8JVA17157
1988 Scat Track	07D0152
1985 F250 Ford Pickup	1FTHF2611FNA60877
1986 Lowboy Trailer	1126LB209FA250034
1975 Int. Tri Axle	D1325EGB23920

and, it is further

DECREED that Elizabeth Munro, Esquire and Eric F. Schell, Esquire, be, and they hereby are, appointed Special Co-Commissioners to endorse titles, bills of sale, certificates of origin and/or any other document, and to do any other act or thing necessary to transfer the titles and ownership of the aforementioned equipment to Ben J. Powers Construction, Inc., from Ralph E. Facemire; and, to secure Liberty Savings Bank's lien thereon; and, it is further

DECREED the Elizabeth Munro, Esquire and Eric F. Schell, Esquire, as Special Co-Commissioners, shall execute a performance bond before the Clerk of this Court in the face amount of $300,000.00 to be without corporate surety to ensure the successful performance of their duties ordered under this Decree; and, it is further

DECREED that Elizabeth Munro, Esquire and Eric F. Schell, Esquire, as Special Co-Commissioners, shall file their report with this Court upon the completion of their duties ordered under this Decree, and, it is further

DECREED that Complainant Liberty Savings Bank, be, and it hereby is; awarded summary judgment against Defendant Ralph E. Facemire on Defendant's Cross-Bill of Complaint for specific performance against Liberty Savings Bank; and, it is further

DECREED that all other issues raised in the pleading by the various parties be, and they hereby are, severed from the issues of specific performance heard in this action, and the parties are hereby ordered to frame the remaining issues to be litigated by letter addressed to the Honorable J. Michael Gamble on or before November 4, 1991.

AND THIS DECREE IS FINAL FOR APPEAL PURPOSES AS TO ALL MATTERS DECIDED HEREIN.

The endorsement of counsel and parties is dispensed with in accordance with Rule 1:13 of the Rules of the Supreme Court of Virginia.

A copy of this Decree was mailed to Mr. Facemire and all counsel this 5th day of November, 1991.

ENTERED this 5th day of November, 1991.

HONORABLE J. MICHAEL GAMBLE
Fauquier County Circuit Court
(Sitting by Designation)

EXCERPT TRANSCRIPT

PROCEEDINGS

CROSS EXAMINATION

BY MR. FACEMIRE:

Q Mr. Powers, isn't it true, you just stated under oath that I was not a director of Ben J. Powers Construction, Inc.?

A I did.

Q Your Honor, I only have one copy, this is from the Corporation Commission, could I simply show it to Your Honor, and to the witness or?

THE COURT: Let the counsel, let the other parties see it.

MR. SCHELL: Your Honor, I would object, if that's from the State Corporation Commission, that doesn't make Mr. Facemire a director, no matter what he says.

The only way he can be a director is by a vote of the shareholders of Ben J. Powers Construction, Incorporated.

THE COURT: I agree, that's an argument to make but is there any evidentiary objection to it?

MR. SCHELL: Not that we can document. And I impose an objection on the record, that document is not certified by the State Corporation Commission. It's simply a microfiche copy.

There's no way to authenticate that that had been an accurate record that is housed in Richmond.

MR. FACEMIRE: Your Honor--?

THE COURT: Wait a minute, let Ms. Munro look at it. Get all the objections out and then we will deal with it.

Okay, Ms. Munro?

MS. MUNRO: Same objections as to documentation.

MR. FACEMIRE: Your Honor, I would point out that I gave copies of this to Mr. Schell when I produced the documents he requested and he produced them and was going to direct them to Mrs. Munro.

Now, there has been no objection thus far in the pleading whatsoever, that I was a director. And I had no knowledge until today that that would be challenged. And here I got proof positive that I was a director every year since I got involved.

THE COURT: Is it authenticate?

MR. FACEMIRE: It is not. It can easily be authenticated because it came directly from the Corporation Commission.

THE COURT: Well, I have to rule in accordance with the Rules of Evidence. I mean, I can't bend those rules. And those rules are that if you have an official document it has to be authenticated in order to be admitted as a document into evidence.

Now, that does not prevent you from questioning the witness about the facts in that document. It's just that I cannot receive that document into evidence. It's just the rules we operate under, and I have to sustain the objection, wish I didn't, but I do.

So the objection is sustained.

MR. FACEMIRE: Can I show it to the witness?

THE COURT: Yes, you may. The objection is sustained as far as admitting it into evidence, but you may show it.

BY MR. FACEMIRE:

Q Mr. Powers, these documents were signed by your wife Hazel--.

MR. SCHELL: Objection, Your Honor, to the characterization, there's no evidence, presented evidence who signed that document.

BY MR. FACEMIRE:

Q Do you have any knowledge of these documents?

A I do not.

Q Are you aware of the fact that the Corporation Commission requires such filings every year?

A I'm partially aware of it, yes.

Q Mr. Powers, do you have reason to believe that there's anything wrong with these documents?

A I don't know, I didn't prepare them, so I don't know.

Q But you have no knowledge of them even being prepared?

A No, I'm sure they were prepared, you have them there, it looks like my wife's handwriting.

Q Looks like you wife's signature, isn't that true.

A Perhaps; I didn't look at the signature.

Q Okay, Mr. Powers, you claim that you and your wife Hazel were directors of that corporation?

A That's what I said.

Q Was a resolution passed and minutes to that affect?

A I'm not sure there is or not.

MR. SCHELL: Your Honor, that was asked and answered in the direct.

THE COURT: Sustained.

BY MR. FACEMIRE:

Q The board of directors is elected each year, isn't that true, Mr. Powers?

A No.

Q You are president of the corporation, isn't that true?

A That's right.

Q Could you tell this Court why they are not elected once a year?

A Why should they be when I own 70 percent of the company, I started the company, I was president, I was owner, why should we have new presidents and stockholders each year.

Q And you claim you owned the whole thing?

A I said 70 percent at the time.

Q Now, Mr. Powers, this conversation that you claimed that I told you that the bank had screwed up, and that we would make

out like bandits, isn't it true, Mr. Powers, that you called me that day and told me that you had done absolutely nothing wrong and you were almost in a crying state of mind?

A Perhaps, I could have been, could have.

Q Mr. Powers, isn't it true, on many occasions you threatened suicide?

MR. SCHELL: Objection, Your Honor.

THE COURT: Sustained, sustained

BY MR. FACEMIRE:

Q Isn't it true, on that day you were seeking sympathy from--.

MR. SCHELL: Objection, Your Honor.

THE COURT: Sustained.

BY MR. FACEMIRE:

Q Let's go over what you say I said. What did you again say that I said to you, then?

A I don't know the exact words, but they were part of the conversation, do not make waves, just be cool, the bank messed up, screwed up, whatever, the bank goofed and not to make waves, and we would make out like bandits. On two or three different occasions. That's almost the exact words.

Q But, Mr. Powers, you just said you don't recall the exact words.

A I said those words were close to what you said. The making out like bandits was one of the words, don't make waves, was one of the words, the bank goofed up and don't make waves, but I think you used another word that I don't prefer to say.

Q What was the word?

THE COURT: Ye, you got to answer it.

THE WITNESS: The bank fucked up, don't make waves.

MR. FACEMIRE: I don't use that word.

THE WITNESS: You sure did.

BY MR. FACEMIRE:

Q Okay, Mr. Powers, when did you first see the defendant's accounting sheet?

A When Mr. Cameron presented it to me.

Q At one point in this game was that?

MR. SCHELL: Objection to the characterization of this as "game"

THE COURT: Try and avoid that, it inflames, it's argumentative.

BY MR. FACEMIRE:

Q At one point--?

A It was on or about the time that you and he assumedly had the meeting at the Citgo station and he came back to the yard. I don't know if it was that specific day or if it was the following day, but it was shortly thereafter.

Q Mr. Powers, have you thought you saw my signature on that accounting sheet?

A No, sir.

Q Did you read the pleading that Mr. Porter filed in this case?

A I don't recall reading, no.

Q Do you have any idea why anybody would say I signed that?

A I don't have no idea why anyone would say it.

Q Mr. Powers, please explain to this Court in your own words, why you believed, that is an agreement where there are parts you disagree with?

MR. SCHELL: Objection, Your Honor. What I think he's actually trying to do is to get to the ultimate issue here.

Does he want to then vary the terms of the agreement by what Mr. Powers believes the agreement says or let agreement speak for itself?

I just want to understand where Mr. Facemire is going with this line of questioning.

THE COURT: Mr. Facemire?

MR. FACEMIRE: Your Honor, they brought this accounting sheet out as a--.

THE COURT: Which document?

MR. FACEMIRE: That document as an agreement and in the interrogatories, Mr. Powers disagrees with parts of it.

THE WITNESS. I didn't say I disagreed with any part of it.

MR. FACEMIRE: In you interrogatories, you did, Mr. Powers.

THE COURT: That is something you can examine him on if he has said something inconsistent.

BY MR. FACEMIRE:

Q Okay. Mr. Powers, you seen the accounting sheet?

A This document, yes.

Q Is there anything on there that you disagree with?

A No really, no.

Q The company owed me $121,100; is that correct?

A Nope.

Q Then you disagree?

A I disagree to a point on that issue.

Q Is there any other point that you disagree with?

A The understanding I had, this document covered everything and this document meant everything that was on it.

Q Okay, in an agreement, you think you can pick and choose the parts you like?

A You was the one that made this up, I looked at it.

Q Okay, the documents that the bank prepared for you, do you think you can go through and just pick the ones you want to abide by?

MR. SCHELL: Objection to relevancy, Your Honor.

THE COURT: Yes, that's not really relevant what he thinks he can or cannot, all you have to question is to whether there's an agreement or not. Focus on that.

MR. FACEMIRE: Well, Your Honor, I think it gets to the heart of it. I mean, he's claiming that this is an agreement.

THE COURT: Yes, but you are over into the bank's documents now

MR. FACEMIRE: What's that?

THE COURT: You are over into the bank's documents now, that's what you last question was.

BY MR. FACEMIRE:

Q Mr. Powers, do you claim that I was involved in any shareholders or directors meetings which authorized you or any person or persons to apply for a loan from Liberty Savings Bank and for buying the equipment from me on behalf of Ben J. Powers Construction, Inc.?

A No.

Q I was involved in no way as director?

A No, not in the company at that time, no, on that decision.

Q I had nothing to do with that decision?

A Not at that time.

Q Did I ever?

A No.

Q Mr. Powers, was I ever informed of any share holders and or directors meetings being held in regard to those transactions?

A No.

Q Mr. Powers, do you recall restructuring a debt the corporation owed Independent Bank?

MR. SCHELL: Objection. Your Honor, relevancy to the issue.

THE COURT: How is that relevant?

MR. FACEMIRE: Your Honor, that transaction with the bank was a part of this transaction in that it brought the payments down so the bank could get the loan, plus there was a machine pledged as collateral to Independent Bank, which Liberty Savings Bank required to be released to process this loan. So the two went hand in hand.

MR. SCHELL: Your Honor. I don't see what that has to do whether there was agreement and whether it was performed--.

THE COURT: Yes, that's what I'm struggling with, Mr. Facemire; how does that relate to whether or not there was agreement between--.

MR. FACEMIRE: I'm simply trying to establish the fact that all this whole thing was transacted without my knowledge whatsoever. Now, the--.

THE COURT: Well, I mean, he's answered, you know, your two questions about did you participate in any shareholders or directors meetings; no. Were you notified of any; no.

BY MR. FACEMIRE:

Q Mr. Powers, do you remember asking Larry Cameron if he could buy that son-of-a-bitch out, referring to me?

A Not the exact words, no.

Q Do you use the term son-of-a-bitch?

A Perhaps I could have.

Q Mr. Powers, do you remember Larry Cameron having to hold you to keep you from hitting me?

MR. SCHELL: Objection. I don't think it's relevant.

THE COURT: Sustained.

BY MR. FACEMIRE:

Q Mr. Powers, why would you believe I would agree to sell over $431,000 worth of equipment to Ben J. Powers Construction, Inc. for $300,000 at the very same time I was make allegations of theft against you?

MR. SCHELL: Your Honor, objection, calls for speculation of the witness as to what was in Mr. Facemire's mind.

THE COURT: The question assumes a number of things that aren't in evidence. So it's sustained.

BY MR. FACEMIRE:

Q Mr. Powers, isn't it true that you told me the corporation did not have the money to pay my rental payments prior to this time?

A Perhaps I could have.

Q Well, perhaps you did. Did the corporation have the money to pay me?

MR. SCHELL: Objection, Your Honor, I think this touches upon the accounting issue which you bifurcated to another day.

We are talking about the transaction, and whether the corporation paid its bills or not, doesn't affect the transaction.

Was there a sale of equipment on November 20, 1989 pursuant to the agreement that's been moved into evidence?

THE COURT: What's the relevancy?

MR. FACEMIRE: Your Honor, it gets to the point that fraud and deceit were used to get me to even think of selling to Larry Cameron. Fraud and deceit is the only reason I offered to sell this equipment to Larry Cameron.

THE COURT: All right. the objections is overruled, go ahead.

BY MR. FACEMIRE:

Q Isn't it true that you withheld the payments Ben J. Powers Construction, Inc. owed me?

A Yes,

Q Isn't it true--

MR. SCHELL: What payments are we talking about?

MR. FACEMIRE: The payments for the rental of the equipment.

THE WITNESS: Can I elaborate a little on that?

MR. FACEMIRE: No.

THE COURT: Well. no. you are just going to have to answer his questions and your lawyer can come back and ask you about it.

THE WITNESS: Ask the question again?

THE COURT: Repeat the question?

BY MR. FACEMIRE:

Q It is true you failed to make proper rental payments to me for the sue of the equipment. isn't it true?

A They were late payments, yes.

Q Isn't it true that no payment for rent of that equipment was made after the first part of September 1989 to me?

A That's true.

Q Isn't it true, the corporation made a profit of over $20,000 the immediate three months prior to that?

A I haven't seen the CPA's records. I couldn't answer that.

Q Was it you, Larry Cameron has just testified, we heard Mr. Cameron testify, that you or your wife Hazel, who gave him the financial statements, was it you that gave those financial statements to Larry Cameron?

A I can't recall?

Q Do you recall who made out those statements?

A I don't know exactly; I assume Hazel.

Q You don't know?

A No.

Q Were you aware of the fact that the corporation made over $20,000 in the immediate three months before that?

A No, I wasn't.

Q Mr. Powers, under oath in bankruptcy court, did you swear no resolution of the board of directors was passed to borrow money form Liberty Savings Bank?

A I stated there was no board meeting, resolution made.

Q But you swore to that in U.S. Bankruptcy Court, isn't that true?

A I'm not sure.

Q Mr. Powers, under oath in bankruptcy court, did you swear Claude T. Compton told you no resolution was required to borrow money from Liberty Savings Bank?

A In a transaction like this I was told that they wouldn't need one.

Q In bankruptcy court you swore that Claude T. Compton told you that, isn't that so?

MR. SCHELL: Your Honor, objection to any comments, any conversations that Mr. Powers and Mr. Compton had.

If he was acting as attorney for Mr. Powers, that's a confidential and privileged relationship. Mr. Facemire is not entitled to investigate that at all.

THE COURT: but if he testified to it, then he's already waived that relationship and I think--.

MR. SCHELL: I think he answered regarding the testimony. He said that there was no resolution passed and he asked then what Mr. Compton had advised him.

THE COURT: All right. Rephrase your question, I want to hear it again.

BY MR. FACEMIRE:

Q Mr. Powers, under oath in bankruptcy court, did you swear Claude T. Compton told you no resolution was required to borrow the money from Liberty Saving Bank?

THE COURT: And the objection is overruled. Go ahead and answer.

THE WITNESS: This was a question that he answered for me after the fact. This was after the loan had been put together.

BY MR. FACEMIRE:

Q That wasn't the question, Mr. Powers.

A Yes, he told me I did not have any.

Q You did swear to that in bankruptcy court?

A Perhaps I did.

Q Mr. Powers, under oath in bankruptcy court, did you swear the Jeep was bought by corporate check and titled in your name?

A I did.

MR. SCHELL: Your Honor, I would just pose another objection on the record. I think we are getting to the accounting phase and I don't think the Jeep is part of the equipment at issue today, and it's no part of the transaction on the 20th of November. I think we are getting sidetracked.

THE COURT: I agree. That's sustained.

BY MR. FACEMIRE:

Q Mr. Powers, on Saturday October 12, 1991, you were driving a tractor trailer rig with no inspection sticker, no tags on the trailer and in grossly unsafe condition and in violation of this court's order, isn't that so?

MR. SCHELL: Objection, Your Honor.

THE COURT: Sustained and I'll say for the record those are issues I have reserved to deal with later.

BY MR. FACEMIRE:

Q Mr. Powers, will you look at those documents and identify them please?

MR. SCHELL: Your Honor, I would like to see the documents.

MR. FACEMIRE: You have them, you have them.

MR. SCHELL: I would like to see the ones the witness might identify.

THE COURT: Let's do this. Let's take about a ten minute break and that will give you an opportunity to go through them.

MR. SCHELL: Very good sir.

(Whereupon a short recess was held.)

THE COURT: Proceed please. Okay, Mr. Facemire.

MR. FACEMIRE: I think you had an objection on the documents that I was presenting.

MR. SCHELL: No objection. I just wanted to look at them, Your Honor. I've satisfied myself as to the documents.

THE COURT: They just wanted to review them. They wanted to see what you were showing the witness. Go ahead.

MR. FACEMIRE: Your Honor, do you have copy there?

THE COURT: Yes.

BY MR. FACEMIRE:

Q Okay, Mr. Powers. I would like you to review those documents and tell the Court first of all what they are.

A Those look like part of the corporation minutes.

Q Isn't it true, Mr. Powers, that's what was produced to me at my request for the all the minutes of the board of directors and shareholders meetings of the corporation?

A As far as I know, yes.

Q Is there any in there missing, that you know of?

A I'm not aware of any.

Q Mr. Powers, when were those--Mr. Powers, do you know when those minute we written?

A No, I do not.

Q Have any idea?

A No.

Q Your signature appears on most of them. Do you have any idea when you signed them?

A No, I do not.

Q Mr. Powers, was it recently you signed those?

A No, this had been some time ago.

Q Well, on the first signature you signed, that's the organizational meeting, do you have any idea when that was signed?

A Repeat the Question?

Q The first minutes here, the organizational meeting. Do you see your signature there?

A I assume sometime in '85.

Q So that signature would have been put on there way back then, right?

A If that's when these were fixed up and signed, yes.

Q Okay, now the next document there is the minutes of a annual meeting of shareholders, do you see that, Mr. Powers?

A Yes.

Q You see you signature on that?

A Yes.

MR. SCHELL: Your Honor, I would just interpose an objection to the relevancy. I guess Mr. Facemire is going somewhere. I just can't fathom, where he's going with this.

THE COURT: Well, it's overruled for the time being, I'll let him ask.

BY MR. FACEMIRE:

A I'm assuming so, yes.

Q Mr. Powers, I call you attention, you see the offer of purchase with my supposedly signature on there?

THE COURT: What's the date of that?

MR. FACEMIRE: No date on it, yes there is. November 3, 1985.

BY MR. FACEMIRE:

Q You see that, Mr. Powers?

A Yes, I do.

Q Do yo have any idea who forged my signature on that document?

A No.

MR. SCHELL: Objection to the characterization of forged, Your Honor. There's no evidence that it's forged. If Mr. Facemire wants to testify as to the validly of this signature on this offer to purchase, that's fine, but that's for another time.

THE COURT: Well, again, the question assumes things that are not in evidence at this point, but you can ask him if he knows whether or not that's your signature.

It may not be your signature, but that doesn't mean it's forged, it may not belong. There's a lot of different ways that can happen, so you have to rephrase your question, please.

MR. FACEMIRE:

Q Mr. Powers, when did you first see that document?

A This document?

Q Yes?

A I assume around the 3rd of November '85.

Q Turn over to the next page, offer to purchase, you see your signature on that?

A Yes.

Q What is that date?

A May 28th in '84.

Q In '84? Mr. Powers, on May 28, 1984, did you and your wife have $35,000?

A I don't know if we did or not.

Q Did you ever pay the $35,000 to the corporation?

A I don't know if we paid it or not.

Q You don't know?

A (No response.)

Q Mr. Powers, I call your attention, I think you can remember your signing a loan application that was made out to Independent Bank, and is in the Liberty Savings Bank file that you signed, claiming the $35,000 as a asset, you recall that?

MR. SCHELL: Objection, Your Honor, you have already ruled as to the Independent Bank documents that they were outside the scope of the transactions before the Court today.

THE COURT: This is remote, so I sustain the objection.

BY MR. FACEMIRE:

Q Mr. Powers, do you have any idea why there were no annual shareholders meetings during the time I was a shareholder?

A One of the reasons we were together mostly each weekend and discussed certain things and we felt that there didn't have to be.

Q Mr. Powers, you and your wife have been together for what, 35 years?

A 38.

Q 38 years?

A Yeah.

Q Why did you find it necessary to have annual shareholders meetings when it was only you and your wife?

A Because the same reasons you and I and her didn't have to have any because we met each time. and her and I sat there and agreed.

Q Have you looked at the documents we have just been going through?

A No, I didn't.

Q You got minutes of annual shareholders meetings?

A Well, perhaps we felt we had to have them without you.

Q Mr. Powers, do you have any idea who drew these minutes?

A No, I don't. My wife does the book work. I don't know if this is stuff that she would have fixed up or by our attorney at the time of it would have done it.

Q Mr. Powers, isn't it true. that these documents were prepared by Mr. Eric Schell just recently?

A Not that I'm aware of.

Q Not that you are aware of?

A Nope.

Q But you are not going to state that he didn't isn't it true?

A I don't know that he did or didn't.

Q How long do you know Mr. Eric Schell?

A A year, I guess.

Q Would it be impossible for him to have drawn up one in 1984, isn't it true, Mr. Powers?

A It probably would have.

Q So you can still not swear that he didn't draw up that one for 1984?

A I can't swear that he didn't, I can't swear that he did.

Q Isn't it true, Mr. Powers, you are under oath, isn't it true, that Mr. Eric Schell drew up these minutes?

A I do not know.

Q Mr. Powers, do you recall the shareholders, do you recall the board of director's meeting held on November 17, 1989?

A Ask that again?

Q Do you recall the board of director's meeting that was held for Ben J. Powers Construction, Inc. on November 17, 1989?

A No, I don't.

Q Are you aware of the fact that on November 20th at Liberty Savings Bank you signed a statement that there was such a meeting?

A No, I'm not.

MR. FACEMIRE: Your Honor, I only have one copy of this. Is there any way I can show it to him and then show it to the Court?

THE COURT: Show it to the attorneys first.

MR. FACEMIRE: This is copy of the resolution passed by the board that you have copies that you produced for me.

MR. SCHELL: No objection.

THE COURT: Do you want the witness to see it?

MR. FACEMIRE: Yes, I want the witness to see it.

THE COURT: Show it to him.

BY MR. FACEMIRE:

Q Mr. Powers, can you identify that document?

A Looks like a corporate resolution.

Q You see your signature on there?

A I do.

Q Do you deny that's your signature?

A No, I don't.

Q Now, do you recall the board of directors meeting that you say there was held?

A No, I don't.

Q Was there a board of directors meeting held that you said there was?

A I stated in the other testimony that there wasn't.

Q There wasn't?

MR. FACEMIRE: Can I introduce that as evidence, Your Honor?

THE COURT: Any objection?

MR. SCHELL: I have no objection.

THE COURT: All right. What I'm going to do is mark this stapled document, multiple page document, as Facemire number 1. And this corporate resolution is Facemire number 2. Go ahead Mr. Facemire.

(Facemire exhibit numbers 1 and 2 were marked for identification.)

BY MR. FACEMIRE:

Q Mr. Powers, isn't it true that you have a habit of signing whatever is put before you if you think that will get you what you want?

MR. SCHELL: Objection, Your Honor.

THE COURT: Sustained.

BY MR. FACEMIRE:

Q Mr. Powers, do you read what you sign?

A Most of the time, yes.

Q Do you recall reading that document?

A I'm not sure.

Q Okay. Mr. Powers, I want to call your attention back to that day that you say, I told you that we would make out like bandits, in your terms, do you recall that day again?

A No, I do not, the exact date.

Q Well okay, just that time. At that time, Mr. Powers, isn't it true, I asked you how could you borrow $300,000 when business was bad and you couldn't buy a scat tractor with 25 percent done one year before when business was good in that conversation, isn't it true?

A Perhaps you did, yes.

Q Do you recall what you response to that was?

A No, I don't

Q You testified, I believe, before, that you could have been in a very humble was asking for sympathy from me at that time, isn't it true?

MR. SCHELL: Objection. Your Honor. I think Your Honor sustained that objection as to characterization of sympathy in that conversation?

THE COURT: Yes, that's sustained.

BY MR. FACEMIRE:

Q Isn't it true you were talking to me in a pleading demeanor?

MR. SCHELL: Objection, Your Honor?

THE COURT: Well, that may have some relevancy. I overrule that objection. Answer the question.

THE WITNESS: I don't recall pleading with you other than getting you to give up the tags and titles and stuff to the equipment.

BY MR. FACEMIRE:

Q Isn't it true that you stated emphatically that you had done nothing wrong and isn't it further true you had stated that you

had stated that you had not gave the banks any wrong statements, financial statement?

MR. SCHELL: Objection, that's a compound question.

THE COURT: Ask him one at a time.

BY MR. FACEMIRE:

Q Isn't it true you stated that you had done absolutely nothing wrong?

A I felt that I hadn't done nothing wrong.

Q Isn't it true that you made that statement?

A Perhaps I did.

Q Isn't it true you stated you had not gave the bank any false financial statements?

A Not to my knowledge.

Q It's true that you made that statement to me though at that time, isn't it?

A Perhaps I could have. I don't recall.

Q Isn't it true at that time I told yo that LSB (Liberty Savings Bank), or some other parties made be trying to get your property from you because of Capital Homes behind you, didn't I tell you at that time?

A You may have. I don't recall.

Q Isn't it true at that time I expressed to you that you may have been a victim of some scheme?

A Your schemes was the onliest one I fell by.

Q Mr. Powers, isn't it true, I told you that you may have been the victim of some scheme to get your property?

A Perhaps you may have, I don't recall.

MR. FACEMIRE: No further questions at this time, Your Honor.

Supreme Court, U.S.
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No. 92-1656

IN THE

SUPREME COURT OF THE

UNITED STATES

October 1993 Term

RALPH E. FACEMIRE

Petitioner,

v.

LIBERTY SAVINGS BANK

Respondent,

v.

BEN J. POWERS CONSTRUCTION, INC.

BEN J. POWERS and HAZEL POWERS

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On January 25, 1990, Liberty Savings Bank filed a bill of Complaint against Ben J. Powers Construction, Inc., and Ben J. and Hazel Powers, individually, seeking documents of Title in conformance with requirements under a commercial loan. Ralph E. Facemire was brought in by cross-bill as a third-party defendant having possession of the title documents. The ownership of the equipment was disputed and on October 23, 1991, that issue was tried and found in favor of the Construction Company. The Final Decree relative to the ownership issue was entered November 5, 1991 (Pet. Supp. App. 11). The trial on all accounting issues was held on April 9, 1992, and a Final Decree of Accounting was entered April 14, 1992 (Pet. Supp. App. 8). The hearing on

sanctions was conducted on September 21, 1992, and a Final Decree awarding sanctions against Ralph E. Facemire was entered December 14, 1992 (Pet. Supp. App. 2). Mr. Facemire appealed these decisions to the Supreme Court of Virginia, which petition for appeal was denied on March 15, 1993 (Pet. App. 22). This Petition for Writ of Certiorari followed.

QUESTIONS PRESENTED

Respondents disagree with the assignments of error and questions presented by the Petitioner in his Petition for Writ of Certiorari. The Petitioner has failed to preserve for appeal his objections to the errors now sought to be assigned.

STATEMENT OF FACTS

On November 20, 1989, Petitioner Ralph E. Facemire ("Facemire") consummated the sale of sixteen (16) pieces of heavy construction equipment and his thirty percent (30%) interest in Ben J. Powers Construction, Inc., to the company ("Powers Construction").

The consideration paid to Facemire was $300,000.00 less the pay off balances on the equipment. Facemire received $83,038.47 in cash on November 20, 1989, and he executed the relinquishment letter bearing the same date concerning his thirty percent (30%) interest in Powers Construction.

The transaction was in writing made in Facemire's own hand. The offer was first made to Larry Cameron, an employee of Powers Construction. Mr. Cameron obtained a loan commitment from Liberty Savings Bank ("LSB") but for

reasons of economic concern did not complete the purchase. LSB had required Powers Construction to guarantee the loan and, naturally, Powers Construction sought to purchase the equipment in Mr. Cameron's stead. Mr. Cameron discussed this with Facemire and Facemire agreed to the sale. Thereafter, Facemire had numerous contacts with LSB providing pay off information and inquiring about the funds due him.

Unfortunately, the bank nor Powers obtained an assignment of title or Power of Attorney from Facemire relating to the titles to the equipment which had been pledged as collateral for the loan. Although Facemire's written offer stated "List of items I own which the $300,000.00 buys" and proceeded to enumerate the sixteen (16) pieces of construction equipment, Facemire, nevertheless, took the position that he had not sold any equipment once the

titles and notes marked "paid" began to appear at his residence in December of 1989.

Facemire admitted he drafted the offer and admitted that he signed the relinquishment letter of November 20, 1989, but continued to assert both an ownership interest in the equipment and ownership interest in the company.

On or about January 25, 1990, LSB initiated a specific performance suit against both Powers Construction and Ben J. and Hazel Powers ("Powers") individually, seeking production of the titles to the equipment in conformance with the loan documents so that LSB could perfect its lien. Facemire maintained the equipment was his. Powers and Powers Construction filed a third-party claim against Facemire seeking specific performance of the contract and production of the titles. Various cross-claims were filed by the

parties. Facemire's claim focused on allegations of fraud and conspiracy by LSB and Powers Construction.

The Honorable William Shore Robertson of the Fauquier County Circuit Court requested the Supreme Court of Virginia to designate another judge to hear the case on an expedited basis. The Honorable Arthur Sinclair was so designated. Facemire brought on nine (9) frivolous motions to be heard which were denied by Judge Sinclair. Thereafter, Facemire began making slanderous allegations about an attorney who was neither a party nor counsel in the case. Judge Sinclair rightfully disclosed that he and the attorney were former neighbors. Facemire then moved for Judge Sinclair to recuse himself. Judge Sinclair politely asked Mr. Facemire to reduce his motion to writing for the record. Subsequently, Judge Sinclair did recuse himself and the

Honorable J. Michael Gamble was designated to preside over the case.

Upon motion of the parties Judge Gamble conducted a pre-trial conference wherein the case was divided into ownership issues, accounting issues, and LSB's fraud and intentional interference counts.

On October 23, 1991, trial was conducted on the ownership issues. All parties presented evidence, witnesses and had the opportunity to cross-examine witnesses. After eight hours of testimony and evidence, Judge Gamble ruled that the equipment belonged to Powers Construction. Judge Gamble severed the remaining issues and entered the Final Decree as to ownership on November 5, 1991 (Pet. Supp. App. 11). Facemire did not note an appeal from this decree.

On April 9, 1992, trial was conducted on the accounting issues.

Both Facemire and Powers Construction filed Motions for Summary Judgment which were argued this same date. After considering the arguments made and the authorities presented, the Court granted Powers Construction's Motion for Summary Judgment. The Final Decree of Accounting was entered April 14, 1992 (Pet. Supp. App. 8). No transcript was made of the proceedings.

Facemire filed his Notice of Appeal of the accounting decree presumably timely, although there was no certificate indicating the date filed. Facemire failed to file any transcripts or a statement of facts in support of his appeal.

On September 21, 1992, trial was conducted on Powers' and Powers Construction's Motion for Sanctions. The Honorable Michael J. Gamble found that Facemire's actions subsequent to the specific performance case were in

many respects undertaken in bad faith with the intent to harass and obstruct, and, accordingly, sanctioned Mr. Facemire (Pet. Supp. App. 2).

Mr. Facemire petitioned the Supreme Court of Virginia to grant an appeal which was denied by the Supreme Court of Virginia on March 15, 1993 (Pet. App. 22).

ARGUMENT AND AUTHORITIES

1. PETITIONER'S ASSIGNMENTS OF ERROR WERE NOT PRESERVED FOR APPEAL

There is no transcript, writing, pleading or documentary evidence that in any manner preserves for appellate review the errors Petitioner now seeks to assign.

Secondly, Mr. Facemire has failed to provide any colorable basis in fact or law to support his allegations of

denial of due process or equal protection.

In order for the United States Supreme Court to review by certiorari the judgment of the state court on the ground that a federal right or privilege is involved, the record must reflect that the right or privilege complained of was raised in the state courts and passed on. Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 33 S. Ct. 510, 57 L.Ed. 857 (1913); Rule 10, Rules of United States Supreme Court; Michie's Jurisprudence, Vol. 1B, Appeal and Error, Section 384.

No such showing can be made by Mr. Facemire on the record.

2. THE JUDGMENTS OF THE TRIAL AND APPELLATE COURTS WERE BASED ON NON-FEDERAL GROUNDS

The United States Supreme Court may exercise its discretion to grant a writ of certiorari to a state supreme court when it appears from the record that the state court of last resort has decided a federal question in a manner which conflicts with the decision of another state court or when a state court of last resort decides an important federal question which ought to be decided by the United States Supreme Court. Neither justification for exercising jurisdiction is implicated here. When a judgment of a state court is based upon a non-federal ground adequate to support it the writ should not be granted. Smith v. Smith, 366 U.S. 210, 81 S.Ct. 1050, 6 L.Ed. 2d 233 (1961).

3. PETITIONER WAS AFFORDED DUE PROCESS OF LAW

Mr. Facemire was provided notice of the proceedings; a neutral decision-maker; an opportunity to make oral presentation to the decision-maker; an opportunity to present evidence and witnesses; an opportunity to confront and cross-examine witnesses and evidence; the right to have an attorney present; the right to compulsory process of witnesses; the right to pre-trial discovery; a public hearing; the opportunity to obtain a transcript of the proceedings; and, a decision based upon the record with a statement of the reasons therefore. Nowak, Rotunda & Young, Constitutional Law, 3rd Ed. (1986).

Despite Mr. Facemire's preoccupation with the theories of conspiracy, the record amply supports Mr. Facemire's participation in the

proceeding below and the fair and unbiased determinations made therein.

4. PETITIONER'S ALLEGED VIOLATION OF EQUAL PROTECTION IS WITHOUT SUBSTANCE

Mr. Facemire has failed to provide any support whatsoever in the record for the contention that the commonwealth attorney, Sheriff, State Police, Governor Wilder, and the FBI have violated his rights to equal protection under the laws.

5. THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS NOT APPLICABLE TO NON-CRIMINAL STATE TRIALS

The Seventh Amendment does not require a jury trial in all state court trials under the Fourteenth Amendment to the United States Constitution. Minneapolis and St. Louis R.R. Co. v.

Bombolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916).

Consequently, absent a federal forum, the states are free to determine whether and under what circumstances a jury may be required in civil litigation.

CONCLUSION

There is ample evidence in the record to support the decisions of the trial and appellate courts. There is no evidence in the record to support the assignments of error and questions presented.

Accordingly, Petitioner's Petition for Writ of Certiorari should be denied.

There are no parent or subsidiary companies which should be disclosed.

Respectfully Submitted:

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